

FATTENING FOODS: UNDER PRODUCTS LIABILITY LITIGATION IS THE BIG MAC DEFECTIVE?

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I. INTRODUCTION

There is no question that Americans are growing more and more concerned about their weight.¹ One need only glance at the morning newspaper to find stories listing the fattest cities in North America² or corresponding articles as to which are the most obese states.³ Also adding to this phenomenon are the latest diet crazes.⁴ The current best seller list is likely to contain at least one book title offering a potentially easy and appetizing way to lose weight.⁵ Additionally, “high protein,” “low carbohydrate,” “Atkins,” and “Sugar Busters” are in-

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1. See, e.g., Michael D. Lemonick, *How We Grew So Big: Diet and Lack of Exercise Are Immediate Causes—But Our Problem Began in the Paleolithic Era*, TIME, June 7, 2004, at 58, 61 (analyzing an obese America); Peg Tyre, *Fighting 'Big Fat': An Army is Mobilizing in a War Against Junk Food; The Combatants: Doctors, Lawyers, Preachers and Moms*, NEWSWEEK, Aug. 5, 2002, at 38-39 (explaining efforts of various groups to draw attention to the harmful effects of “junk foods”).

2. See, e.g., Aline McKenzie, *Uh-oh: A Bigger D Than Ever*, DALLAS MORNING NEWS, Jan. 9, 2004, at 1E (highlighting a 2003 poll taken by the magazine *Men's Fitness*, which ranks the fattest cities in the country).

3. See generally *id.* (showing Texas cities filling five of the top ten spots in an annual list of fattest cities generated by *Men's Fitness* magazine).

4. See generally Lisa Chernikoff, *Low-Carb Mania: A University of Michigan Expert Explains Why Low-Carb Diets Are Not the Best Choice*, AM. FITNESS, May-June 2004, at 45-46 (discussing the effects of low-carb diet plans).

5. See, e.g., Wendy Tanaka, *On the Strength of a Previous Hit, Rodale Pumped for Next "South Beach,"* PHILADELPHIA INQUIRER, Oct. 10, 2004, at E1 (discussing the proliferation of best-selling diet books in the context of the marketing organization created by the author of *The South Beach Diet*).

creasingly common terms.⁶ Television commercials, as well as infomercials, are also contributors to this obsession with weight.⁷ They tout exercise machines, along with memberships to health clubs, promising to give all of us the body of Adonis⁸ or the female equivalent.

Adding to the flood of weight-related information swarming at consumers are the federal government's labeling requirements for packaged food products.⁹ Labels are required to list calories, protein, fat, saturated fats, carbohydrates, cholesterol, sodium, sugar, dietary fiber, as well as percentage information for iron, riboflavin, niacin, various vitamins, and other ingredients.¹⁰ The medical profession has also added its own opinion to the nation's weight obsession by declaring that obesity is now the second largest cause of preventable death in the United States.¹¹

Many commentators have speculated that the central cause of the issue is the American lifestyle.¹² The sit-down family dinner has become a Norman Rockwell fantasy of days long past,¹³ and in fact, fast

6. See Chernikoff, *supra* note 4; ROBERT C. ATKINS, ATKINS FOR LIFE 8 (2003); H. LEIGHTON STEWARD ET AL., THE NEW SUGAR BUSTERS: CUT SUGAR TO TRIM FAT (2003).

7. See generally Ann-Christine P. Diaz, *No Washboard Stomachs in Gym Ad: Crunch Fitness Continues Quirky Direction to Boost Brand's Attitude*, ADVERTISING AGE, Nov. 1, 1999, at 18; Bryan Burrough, *Allure of Home-Exercise Devices Sparks Big Sales—and Many Injuries*, WALL ST. J., Apr. 16, 1985, § 7, at 33; *Active Advertising*, SPORTING GOODS BUS., Feb. 1994, at 112.

8. See 1 THE NEW ENCYCLOPEDIA BRITANNICA 105 (15th ed. 2002) (describing Adonis as "a youth of remarkable beauty").

9. See generally Food Labeling, 21 C.F.R. §§ 101-101.95 (2004) (explaining the general requirements for the labeling of packaged foods meant for human consumption).

10. See generally 21 C.F.R. § 101.9 (2004).

11. See, e.g., Centers for Disease Control and Prevention (CDC), *Improving Nutrition and Increasing Physical Activity*, at http://www.cdc.gov/nccdphp/bb_nutrition/ (last visited Feb. 21, 2005) (explaining that obesity is second only to tobacco smoking on the list of preventable deaths); see also Robert J. Samuelson, *The Afflictions Of Affluence*, NEWSWEEK, Mar. 22, 2004, at 45 (stating that 435,000 lives were lost from smoking and 400,000 lives were lost to obesity in a recent year).

12. See, e.g., Lemonick, *supra* note 1, at 61-62 (explaining that the Western lifestyle is a predominant factor in obesity); see also Traci Watson, *What Really Plumps You Up: The Culprits—Newly Found Genes, Hormones and Flab-Inducing Lifestyles*, U.S. NEWS & WORLD REP., Dec. 12, 1994, at 80 (arguing that "[t]oday's lifestyle, with its labor-saving devices and its abundance of what obesity experts call 'highly palatable food,' is perfectly calculated to make people fat").

13. See Jeffrey Kluger, *Why We Eat*, TIME, June 7, 2004, at 72, 73 (discussing what the author lamented as "the death of the official mealtime" as possibly the biggest factor in the obesity epidemic).

food has become a mainstay in our diet.¹⁴ While there is no intention to single out McDonald's contribution to the obesity problem, there is little question that the Big Mac and the company's logo the so-called "Golden Arches," have become two of the primary images associated with fast food consumption.¹⁵ The fact remains, however, that regardless of who sells fattening food, to many people it has a certain allure over food which is bland.¹⁶

As of December 2004, there was only one case where plaintiffs sought to recover damages for obesity allegedly caused by fast food consumption.¹⁷ The trial judge in that case dismissed the lawsuit before the discovery phase could begin, and the suit was later revived at the appellate level.¹⁸ So the question remains: can fattening food be considered defective under products liability law? In other words, if we use McDonald's Big Mac as a symbol for fast food consumption, can we hold it liable for America's problem with obesity?

14. See Amanda Spake, *How McNuggets Changed the World*, U.S. NEWS & WORLD REP., Jan. 22, 2001, at 54 (explaining that "[o]n any given day, about one quarter of U.S. adults visit a fast-food restaurant"); ERIC SCHLOSSER, *FAST FOOD NATION* (2002) ("Americans now spend more money on fast food than on higher education, personal computers, computer software, or new cars. They spend more on fast food than on movies, books, magazines, newspapers, videos, and recorded music—combined.").

15. See Daniel Eisenberg, *Can McDonald's Shape Up?*, TIME, Sept. 30, 2002, at 52 (noting that McDonald's opens a new restaurant somewhere around the globe every eight hours); Stephen Koepf, *Big Mac Strikes Back: Burger Bashers, Watch Out! McDonald's Is on a Roll*, TIME, Apr. 13, 1987, at 58, 59 (quoting a professor of anthropology who said, "[Y]ou can hardly spend a day without seeing a golden arch").

16. See Matthew Boyle, *Can You Really Make Fast Food Healthy?*, FORTUNE, Aug. 9, 2004, at 134, 136-37 (discussing fast-food restaurants' failed attempts to sell healthier food and quoting Janice Meyer, an analyst, who said, "A lot of companies were chasing the nutritional content and not the taste bud."); see also Richard A. Lovett, *How Your Brain Plays with Food*, PSYCHOL. TODAY, July-Aug. 2004, at 18 (explaining studies where food color and presentation factored into consumption amounts).

17. See *Pelman v. McDonald's Corp.*, No. 02 CIV. 7821(RWS), 2003 WL 22052778, at *14 (S.D.N.Y. 2003) (dismissing plaintiffs' claim against McDonald's because of their failure to make "explicit allegations that they witnessed any particular deceptive advertisement [and because they did not provide] McDonald's with enough information to determine whether its products [were] the cause of the alleged injuries"); *rev'd and remanded* by 396 F.3d 508 (2nd Cir. 2005) (holding that the case was improperly dismissed by the district court because this information "is appropriately the scope of discovery" under the notice pleading requirements of FED. R. CIV. P. 8(a)).

18. See 396 F.3d 508 (reviving the lawsuit and noting that the trial judge did not expressly state that there was not a conceivable cause of action against McDonald's, rather he based his dismissal on the fact that the plaintiffs had failed to properly plead their case under New York law).

II. THE TEST FOR DEFECTIVENESS

American jurisprudence has always held purveyors of defective foods liable.¹⁹ Over the years this liability has been imposed under theories of strict liability, actionable negligence,²⁰ and/or an implied warranty of fitness.²¹ The trend continued when strict products liability, the focal point of this article, came into prominence during the 1960s.²²

The latter is perhaps the most plaintiff-friendly cause of action, simplifying the requirements of a cause of action. Most jurisdictions require the product to be defective, require the plaintiff to prove the defective condition caused the plaintiff's injury, and the product must have been in a defective condition at the time the defendant seller placed it into the stream of commerce.²³ The law on the requirement of defectiveness is quite clear. Our system of jurisprudence will not impose absolute liability upon the seller of goods.²⁴ To do so would

19. See, e.g., *Van Bracklin v. Fonda*, 12 Johns. 468 (N.Y. Sup. Ct. 1815) (holding the seller of beef strictly liable for failing to disclose that the cow had been diseased prior to slaughter); Herbert W. Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 736-37 (1970) (noting American courts came to the early conclusion that the justification for the food warranties was not based in contract, but rather on policy); see also David G. Owen, *Manufacturing Defects*, 53 S.C. L. REV. 851, 886 (2002) (indicating that early English statutes criminalized the sale of unwholesome food and drink sold for immediate consumption).

20. See, e.g., *Drury v. Armour & Co.*, 216 S.W. 40, 41-42 (Ark. 1919) (stating that a plaintiff who consumes unwholesome food products can proceed under a negligence recovery theory); *Lynch v. Hotel Bond Co.*, 167 A. 99 (Conn. 1933) (stating that "recovery can be had based upon negligence in the preparation and service of food and drink in a hotel or restaurant"); *Dickens v. Horn & Hardart Baking Co.*, 209 A.2d 169, 171 (Del. Super. Ct. 1965) (stating the rule that the presence of a foreign substance in food creates a presumption of negligence).

21. See *Heise v. Gillette*, 149 N.E. 182, 183 (Ind. App. 1925) (stating that there is an implied warranty that food is wholesome); *Stewart v. Martin*, 181 S.W.2d 657, 658 (Mo. 1944) (stating that the sale of unwholesome food would impose absolute liability on the seller for breaching the implied warranty of fitness); *S.H. Kress & Co. v. Ferguson*, 60 S.W.2d 817, 822 (Tex. Civ. App. 1933) (holding that an implied warranty of fitness accompanies the sale of food for immediate consumption).

22. See William E. Westerbeke, *The Sources of Controversy in the New Restatement of Products Liability: Strict Liability Versus Products Liability*, 8 KAN. J.L. & PUB. POL'Y 1, 6 (Fall 1998) (asserting that section 402A at its inception was intended to address the traditional barriers to recovery, but it expanded through interpretations to the entire field of products liability).

23. See, e.g., 1 DAVID G. OWEN ET AL., MADDEN AND OWEN ON PRODUCTS LIABILITY § 5:3 (3d ed. 2000).

24. See, e.g., *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 879 (Alaska 1979) (enunciating the rule that strict liability is not absolute liability); *Fibreboard Corp. v.*

make the seller an insurer.²⁵ Instead we utilize strict products liability, and the cornerstone of this cause of action requires a product, or food, to be in a defective condition.²⁶ Considering that any product can cause injury,²⁷ and no product is technologically perfect, the importance of creating a test that determines this condition becomes clear. It became clear early on that any product could be defective if it was mismanufactured,²⁸ mis-marketed,²⁹ or mis-designed;³⁰ although the test is different in each instance.

A. *Mismanufactured*

Unlike other areas of products liability litigation, the test for defectiveness where food has been mismanufactured has remained fairly constant.³¹ In this instance, the manufacturer has placed the product

Fenton, 845 P.2d 1168, 1175 (Colo. 1993) (stating that strict liability is not absolute liability).

25. See, e.g., *Carlin v. Super. Ct. (Upjohn Co.)*, 920 P.2d 1347, 1349-50 (Cal. 1996) (stating that the manufacturer does not become an insurer under strict liability); *Ernest W. Hahn, Inc., v. Armco Steel Co.*, 601 P.2d 152, 157 (Utah 1979) (noting that under strict liability, the manufacturer does not become an insurer).

26. See, e.g., *Jimenez v. Sears, Roebuck & Co.*, 904 P.2d 861, 864 (Ariz. 1995) (stating that to make a prima facie case of strict liability, the plaintiff must show that the product was defective when it left the defendant's control); *O'Mara v. Dykema*, 942 S.W.2d 854, 858 (Ark. 1997) (stating that the product must be in a defective condition that is unreasonably dangerous in order to sustain a cause of action for strict products liability).

27. Virtually any product can cause an injury and thus give rise to strict products liability. See, e.g., *DeSantis v. Parker Feeders, Inc.*, 547 F.2d 357 (7th Cir. 1976) (discussing cattle feeders); *Collins v. Montgomery Ward & Co.*, 315 N.E.2d 670 (Ill. App. Ct. 1974) (discussing ladders); *Blevins v. Cushman Motors*, 551 S.W.2d 602 (Mo. 1977) (discussing golf carts).

28. See, e.g., 1 OWEN, *supra* note 23, at § 7:1 (explaining that a product with a manufacturing defect is "mismanufactured," meaning it varies from the manufacturer's standards or blueprints and this variance causes the product to become dangerous or unfit for its intended use).

29. See *id.* at § 9:1 (explaining that a manufacturer's failure to give the consumer adequate information about the hazards of using the product may also give rise to a claim under strict liability; and that the most common claims center around whether the product was accompanied by adequate warnings and instructions).

30. See *id.* at § 8:1 (explaining that a comprehensive definition of defective design does not exist, but cases involving defective design questions generally evaluate the safety and effectiveness of products as they were intended to be manufactured and used by the public).

31. One of two primary tests is the foreign/natural test which puts the primary focus on whether the object is natural to the foodstuff in which it was found. See *infra* notes 34-36. The other predominant test is the reasonable expectation test, which creates a fact question as to whether a consumer would reasonably expect to find such a substance in his or her food. If the consumer would reasonably expect to find such

into the stream of commerce in a condition that the manufacturer did not intend.³² It is different from the rest of the defendant's production because of the alleged defective qualities, or defective substance, in question.³³ In scenarios involving food, the courts at first adhered to the so-called foreign/natural test.³⁴ Under this theory, the initial question was if the disputed substance was natural to the product, such as a fragment of a shell in a pecan pie,³⁵ or if it was foreign, such

a substance, then the seller or manufacturer is not liable; conversely, if a consumer would not reasonably expect to find such a substance, then the seller or manufacturer is liable. See *infra* note 61.

32. See 1 OWEN, *supra* note 23, at § 7.1 (defining a manufacturing defect as "an aberration that may affect only a single product," caused by noncompliance to the manufacturer's blueprints or plans creating a flaw that makes the product more dangerous and unfit for use. "In other words, the product with a manufacturing defect is mismanufactured.")

33. See generally *Reichert Milling Co. v. George*, 162 So. 393 (Ala. 1935) (finding a decomposed rat in flour used to make biscuits); *Burkhardt v. Armour & Co.*, 161 A. 385 (Conn. 1932) (finding that a consumer swallowed and ate food which contained particles of a can); *Robinson v. ITT Cont'l Baking Co.*, 478 A.2d 265 (Conn. App. Ct. 1984) (finding that a consumer ingested a cupcake that contained a piece of glass); *Halem v. Wagner Baking Co.*, 184 N.Y.S.2d. 54 (N.Y. City Ct. 1959) (stating that a consumer bit into a stone while eating pie).

34. See, e.g., *Mix v. Ingersoll Candy Co.*, 59 P.2d 144, 148 (Cal. 1936) (coming to the conclusion that objects not intended to be included in foods but are natural derivatives of foods, such as bone slivers in ground meat or cherry pits in cherry pie, are natural and absolve the vendor of liability for selling the product). See also Jane Massey Draper, Annotation, *Liability for Injury or Death Allegedly Caused by Food Product Containing Object Related To, But Not Intended to be Present In, Product*, 2 A.L.R. 5th 189 (1992) (highlighting the nature of the foreign/natural test). This initial test determined "liability for injuries caused by objects in food which are natural and related to the food but not intended to be in the food." *Id.* at § 2[a].

The test creates liability, on the basis of breach of an implied warranty of wholesomeness and reasonable fitness for human consumption, for the vendor of food containing a foreign object which injures a consumer, but absolves the vendor where the object is natural to the food, since the presence of the natural object does not render the food unwholesome, nor, on the premise that a consumer is not entitled to expect perfect food, does it render the food not reasonably fit for human consumption. With regard to negligence, this test requires a consumer to act upon common knowledge that certain food products may contain natural parts of the ingredients, albeit not intended to be in the final product *Id.*

35. See *Jackson v. Nestle-Beich, Inc.*, 589 N.E.2d 547 (Ill. 1992); see also *Ford v. Miller Meat Co.*, 33 Cal. Rptr. 2d 899 (Cal. Ct. App. 1994) (discovering a bone fragment in ground beef); *Porteous v. St. Ann's Cafe & Deli*, 713 So. 2d 454 (La. 1998) (discovering a pearl in a raw oyster); *Mitchell v. T.G.I. Friday's*, 748 N.E.2d 89 (Ohio Ct. App. 2000) (discovering a clam shell in fried clam strips); *Williams v. Braum Ice Cream Stores, Inc.*, 534 P.2d 700 (Okla. Ct. App. 1974) (discovering a cherry pit in cherry ice cream).

as a piece of glass in a bar of candy.³⁶ The test was perhaps too simple and led to some inequitable results when, for example, a plaintiff with a broken or chipped tooth brought about by a cherry pit in cherry ice cream³⁷ or by a sliver of bone in a hamburger³⁸ was left without a remedy.³⁹

As a result, this test soon gave way to the newer, and almost universally accepted, reasonable expectations test.⁴⁰ In this scenario, the jury is asked to answer the following question of fact: would the ordinary user or consumer reasonably expect to find the substance in question in his or her food?⁴¹ If the answer is yes, by definition the

36. See *Curtiss Candy Co. v. Johnson*, 141 So. 762 (Miss. 1932); see also *Hickman v. WM. Wrigley, Jr. Co.*, 768 So. 2d 812 (La. Ct. App. 2000) (finding a metal screw in chewing gum); *CEF Enters. v. Betts*, 838 So. 2d 999 (Miss. Ct. App. 2003) (finding insect-contaminated food); *Cohen v. Allendale Coca-Cola Bottling Co.*, 351 S.E.2d 897 (S.C. Ct. App. 1986) (discovering a dead insect in a bottle of soda).

37. See *Williams* 534 P.2d at 701.

38. See *Brown v. Nebiker*, 296 N.W. 366, 371 (Iowa 1941).

39. See *Webster v. Blue Ship Tea Room, Inc.*, 198 N.E.2d 309, 312 (Mass. 1964) (determining that when sitting down for a bowl of fish chowder, one can reasonably anticipate and guard against finding a fish bone); *Adams v. Great Atl. & Pac. Tea Co.*, 112 S.E.2d 92, 98 (N.C. 1960) (concluding that a consumer can be expected to anticipate a crystallized grain of corn in a box of corn flakes); *Allen v. Grafton*, 164 N.E.2d 167, 175 (Ohio 1960) (holding that a small piece of shell in a fried oyster is natural and can be reasonably anticipated).

40. See, e.g., *Mexicali Rose v. Superior Ct.*, 822 P.2d 1292, 1302-04 (Cal. 1992) (changing California law from the foreign/natural test to one of reasonable expectation). The *Mexicali* test changed the foreign/natural test from one which focuses on the nature of the object in the food to a test of whether a customer could reasonably expect to find the object in the food. *Id.* at 1302. The reasonable expectation test differs from the foreign/natural test mainly in that (1) it is a question of fact as to whether the injurious substance is to be anticipated and (2) the focus is not on the components of the dish but rather on the completed product, considering the nature of the dish and the nature of its preparation. *Id.* The difference between the two tests only comes into play when the object in the food is "natural" to the food. No instant strict liability exists but rather a question of fact as to whether the consumer could reasonably expect to find the object. *Id.* at 1303-04. See also *Langiulli v. Bumble Bee Seafood, Inc.*, 604 N.Y.S.2d 1020, 1021 (N.Y. Sup. Ct. 1993) (abolishing the foreign/natural test in favor of the reasonable expectation test); *Betehia v. Cape Cod Corp.*, 103 N.W.2d 64, 69 (Wis. 1960) (stating that the test for whether food is defective is if the consumer reasonably expected the foreign object, not whether the object was merely foreign or natural).

41. Compare *Ex parte Morrison's Cafeteria of Montgomery, Inc.*, 431 So. 2d 975, 979 (Ala. 1983) (holding that a consumer may reasonably expect to find a fish bone in a fish fillet), with *Johnson v. So. Pac. Canning Co.*, 580 So. 2d 556, 558 (La. Ct. App. 1991) (stating that a fish eye lens in a can of tuna was not natural and not reasonably expected by consumers), *Phillips v. West Springfield*, 540 N.E.2d 1331, 1333 (Mass. 1989) (noting that a high school student may or may not reasonably expect to find a turkey bone in a school-provided lunch), *Ruvolo v. Homovich*, 778 N.E.2d 661, 663

food is not in a defective condition, and if the answer is no, then the food is in a defective condition. Mismanufactured food disputes are fascinating; however, they are not within the realm of our primary discussion. We are more concerned with foodstuff that contains a high degree of fat or other fattening substances. The inclusion of these fattening ingredients is intended by the manufacturer and, as a result, this raises the separate issue of whether a product has been mis-marketed and/or mis-designed.

B. *Mis-Marketed*

A product is mis-marketed when there has been a failure to issue adequate warnings or instructions about the use or consumption of the product.⁴² A product is mis-designed when all of the parts or ingredients have been planned and are intended to be part of the goods as ultimately introduced into the stream of commerce. Adequate warnings deal with the safe use of a product,⁴³ and adequate instruc-

(Ohio Ct. App. 2002) (stating that a restaurant customer should reasonably expect to find a chicken bone in a chicken sandwich), *and* *Jefferies v. Clark's Rest. Enter.*, 580 P.2d 1103, 1104 (Wash. Ct. App. 1978) (stating that whether a patron reasonably expected crab shell in a crab sandwich is a question for the jury). *See also* *Draper*, *supra* note 34 (discussing the differences between the foreign/natural and reasonable expectation test).

42. *See, e.g., Chandler v. Gene Messer Ford, Inc.* 81 S.W.3d 493, 504 (Tex. Ct. App. 2002) (listing the elements that a plaintiff must prove to recover under a defective warning theory). *Chandler* states that to recover for a mis-marketed product, a plaintiff must prove: 1) a risk of harm is inherent in the product or may arise from the intended or reasonably anticipated use of the product; 2) the product supplier actually knew or should have reasonably foreseen the risk of harm at the time the product was marketed; 3) the product must possess a marketing defect; 4) the absence of a warning or instructions renders the product unreasonably dangerous to the user or consumer of the product; 5) the existence of a causal nexus between the failure to warn or instruct and the user's injury. *Id.* at 504; *cf.* RESTATEMENT (SECOND) OF TORTS § 402A cmt. (1965) (explaining that a seller "may be required to give directions or warning on the container as to its use"); JAMES A. HENDERSON, JR. AND AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* (5th ed. 1994) (stating that a majority of marketing defects occurs when the manufacturer fails to give adequate warnings and instructions).

43. *See, e.g., Radiation Tech., Inc. v. Ware Constr. Co.*, 445 So. 2d 329, 331 (Fla. 1983) (stating that a product can be defective due to inadequate instructions and warnings regarding safe use); *Robinson v. Williamsen Idaho Equip. Co.*, 498 P.2d 1292, 1300 (Idaho 1972) (explaining that instructions on "safe operation" alone may not qualify as adequate warnings); *Moran v. Faberge, Inc.*, 332 A.2d 11, 15 (Md. 1975) (stating that a manufacturer has a duty to produce a safe product and provide adequate warnings and instructions).

tions deal with its corresponding effective use.⁴⁴ American jurisprudence has decreed that this information must be adequate,⁴⁵ and courts have interpreted "adequate" to mean that (1) the information in question must reach the ultimate user or consumer,⁴⁶ (2) the consumer must notice the information,⁴⁷ (3) and most importantly, the information must penetrate the consumer's mind.⁴⁸ In other words,

44. See *Anderson v. Nissei ASB Mach. Co.*, 3 P.3d 1088, 1093 (Ariz. Ct. App. 1999) (holding that a jury could have inferred that poor instructions for safe use of the product in question could have rendered it defective); *Armentrout v. FMC Corp.*, 842 P.2d 175, 180 (Colo. 1992) (stating that a product can be defective if accompanied by inadequate instructions for use); *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 161 (Ind. App. Ct. 1997) (stating that duty to warn consists of two duties, the duty to provide instructions for safe use and the duty to warn of potential dangers of improper use).

45. See, e.g., *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402, 404 (1st Cir. 1965) (stating that an adequate warning is one that would indicate to a reasonably prudent person the nature and extent of the danger that the product offers); see also M. Stuart Madden, *Selected Federal Tort Reform and Restatement Proposals Through the Lenses of Corrective Justice and Efficiency*, 32 GA. L. REV. 1017, 1056 (1998) (defining an adequate warning as one that must "by its size, location, and intensity of language or symbol, be calculated to impress upon a reasonably prudent user of the product the nature and extent of the hazard involved").

46. See, e.g., *Byrne v. SCM Corp.*, 538 N.E.2d 796, 811 (Ill. App. Ct. 1989) (stating that instructions and warnings may be insufficient if they fail to reach the foreseeable users); *Hoffman v. E.W. Bliss Co.*, 448 N.E.2d 277, 283 (Ind. 1983) (stating that the manufacturer has a duty to provide warnings and instructions that will reach the end consumer).

47. See generally *Richards v. Upjohn Co.*, 625 P.2d 1192, 1196 (N.M. Ct. App. 1980) (stating that "the manufacturer must bring the warning home" to the user); James B. Sales, *The Duty to Warn and Instruct for Safe Use in Strict Tort Liability*, 13 ST. MARY'S L. J. 521, 559 (1982) (asserting that a proper warning is one that conveys "the warning in such a manner as to assure that a user's attention will be attracted").

48. Courts appear to have much faith in the American consumer. See, e.g., *Milnowicz v. The Raymond Corp.*, 148 F. Supp. 2d 525, 528 (D.N.J. 2001) (incorporating a presumption that a warning that is given will be heeded and followed); *Lee v. Martin*, 45 S.W.3d 860, 865 (Ark Ct. App. 2001) (agreeing that there is a rebuttable presumption that consumers will read and follow safety instructions); *Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820, 826-27 (Ind. Ct. App. 1975) (agreeing that a rebuttable presumption exists in favor of the manufacturer); *USX Corp. v. Salinas*, 818 S.W.2d 473, 484 n.13 (Tex. App. 1991) (stating that there is a well-established presumption that an injured party will read and heed a proper warning if one is given). The presumption referred to in *Martin* and *Nissen Trampoline* is clearly rebuttable if it can be shown that even adequate warnings would have been a futile effort. See *Martin*, 45 S.W.3d at 865. Other courts have taken the position that an inadequate warning is no warning and thus dismiss the need for the plaintiff to prove causation between the inadequate warning and plaintiff's injury. See, e.g., *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 87 (4th Cir. 1962) (opining that the effect of an inadequate warning is no warning at all).

in products liability disputes the information must have been delivered to the plaintiff, and the plaintiff must pay have paid attention to it.

After some trial and error, it was finally decided that the best test for determining defects in these scenarios would be to use the so-called risk/benefit analysis.⁴⁹ It is expressed as $PL(G) > B = D$, which means that if the probability (P) of loss (L) multiplied by the gravity of the injury (G) is greater than the burden (B) of reducing or eliminating that risk, then the court will find that the product is in a defective condition (D).⁵⁰ The opposite formula is also true. If the jury determines that the burden is greater than the probability of loss multiplied by the gravity of the injury, then the jury will find that the product is not in a defective condition.⁵¹ The formula is appropriate for

49. See *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 469 (5th Cir. 1985) (stating that adequate warnings must be considered in balancing the risks of a product); *Fibreboard Corp. v. Fenton*, 845 P.2d 1168, 1173 (Colo. 1993) (discussing the risk/benefit test as a method of determining whether a product is defective due to poor marketing); *Ruiz-Guzman v. Amvac Chem. Corp.*, 7 P.3d 795, 807 (Wash. 2000) (stating that "[m]ost courts agree that, for the liability system to be fair and efficient, the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution"); see generally A.D. Twerski et al., *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 514 (1976) (describing the balancing test for defectiveness based on design as the weighing of probability and gravity of the harm versus the cost of warning the user of the harm); W. Kip Viscusi, *Wading Through the Muddle of Risk-Utility Analysis*, 39 AM. U. L. REV. 573, 575 (1990) (stating that the risk/benefit test is generally applicable when (1) analyzing a physical design to determine, for example, if a safety devices is warranted; (2) analyzing the need for hazard warnings; and (3) determining whether the product should be marketed at all).

50. See Charles E. Cantú, *Distinguishing the Concept of Strict Liability in Tort from Strict Products Liability: Medusa Unveiled*, 33 U. MEM. L. REV. 823, 872-73 (2003) (offering additional explanations of the formula); see also *Camacho v. Honda Motor Co.*, 741 P.2d 1240, 1247-48 (Colo. 1987) (enunciating the factors to consider in determining whether a product's benefits are outweighed by its risks); *Bryant v. Hoffmann-La Roche, Inc.*, 585 S.E.2d 723, 728 (Ga. Ct. App. 2003) (stating that a pharmaceutical manufacturer will be relieved of liability only upon a showing that (1) the product was properly manufactured and contained adequate warnings; (2) the benefits outweighed the risks; and (3) it was impossible to make the product safer).

51. See, e.g., *Quintana-Ruiz v. Hyundai Motor Corp.*, 303 F.3d 62, 70-74 (1st Cir. 2002) (holding that the utility of an airbag exceeded its risk); *Williams v. Briggs Co.*, 62 F.3d 703, 706-07 (5th Cir. 1995) (finding that the design of a thermostat was not unreasonably dangerous under the risk/benefit analysis simply because it could heat to 170 degrees, because an ordinary person was capable of avoiding the danger presented by the thermostat); *Burks v. The Firestone Tire & Rubber Co.*, 633 F.2d 1152, 1155-56 (5th Cir. 1981) (affirming the district court's decision to allow the jury to use the risk/benefit test to conclude that a tire rim was not defective).

settling questions of whether a product is defective in its marketing or design. Unlike a product that has been mismanufactured, the manufacturer in these cases intended to introduce the product into the stream of commerce in its present form, and a finding of defectiveness will condemn the manufacturer's entire line of production.⁵²

The plaintiff's burden in a mis-marketing case is to establish that the marketing of the product was defective because an additional warning or instruction would have eliminated the risk of the injury sustained.⁵³ At first impression it appears that, as result of this standard, all products would be defective.⁵⁴ How much of a burden could an additional warning or instruction be? The result of PL(G) would always be greater than the burden of issuing one more item of information. An analysis of the cases, however, establishes that if the manufacturer warns of all possible risks, then we will ultimately reach the

52. See James A. Henderson, Jr. et al., *Restatement Third, Torts: Products Liability: What Hath the ALI Wrought?*, 64 DEF. COUNS. J. 501, 506 (1997) (explaining that when a product is found to be defective due to mis-design or inadequate warnings, the manufacturer's entire product line is condemned); Thomas C. Bigosinski, *Constitutional Law—Preemption and Products Liability—Federal Cigarette Labeling and Advertising Act Held Not to Preempt State Common Law Damage Actions—Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), 23 SETON HALL L. REV. 1791, 1796 n.19 (1993) (stating that omission of the duty to warn is grouped with design defects and thus may render an entire line of products defective); James T. O'Reilly, *Product Recalls & The Third Restatement: Consumers Lose Twice from Defects in Products and in the Restatement Itself*, 33 U. MEM. L. REV. 883, 886 (2003) (stating that a design defect renders an entire line of products defective, while a warning defect may render the labels or packages defective).

53. See generally George W. Flynn & John J. Laravuso, *The Existence of a Duty to Warn: A Question for the Court or the Jury?*, 27 WM. MITCHELL L. REV. 633 (2000); see also George W. Soule & Jacqueline M. Moen, *Failure to Warn in Minnesota, the New Restatement on Products Liability, and the Application of the Reasonable Care Standard*, 21 WM. MITCHELL L. REV. 389, 407-08 (1995) (stating that in a failure-to-warn case, the plaintiff must prove that the defendant's lack of instructions caused the plaintiff's injuries); J. David Tate, Comment, *The American Law Institute Study on Enterprise Liability for Personal Injury: How Does Texas Tort Law Compare?*, 45 BAYLOR L. REV. 103, 111 (1993) (stating a plaintiff must prove that "when a product is defective due to inadequate labeling, the warning (or lack thereof) must be a producing cause of the injury").

54. See, e.g., *Moran v. Faberge, Inc.*, 332 A.2d 11, 15 (Md. 1975) (noting that when engaging in a cost/benefit test, the cost of giving adequate warnings is usually so minimal that the balance will almost always weigh in favor of an obligation to warn of latent dangers); see also Charles E. Cantú, *Distinguishing the Concept of Strict Liability for Ultra-Hazardous Activities from Strict Products Liability Under Section 402A of the Restatement (Second) of Torts: Two Parallel Lines of Reasoning That Should Never Meet*, 35 AKRON L. REV. 31, 51-53 (2001) (stating that at first glance, under the risk/benefit test, the burden of placing an extra warning on a label will always be outweighed by the probability and magnitude of harm; however, a point of diminishing returns precludes warnings for all possible dangers).

point of "warnings pollution."⁵⁵ Pity the poor manufacturer! If they issue too much information, we will effectively reach a point of diminishing returns.⁵⁶ The consumer will more than likely ignore voluminous amounts of data.⁵⁷ On the other hand, if the manufacturer fails to inform a user of a risk, and a jury subsequently determines the risk was foreseeable, the manufacturer will be held responsible for having introduced a defective product into the stream of commerce.⁵⁸ The resulting confusion is not satisfactory. We can, at best, only offer manufacturers guidelines.

Fortunately, our focus is not on whether a product is defective because it has been mis-marketed. The high content of fat and fatten-

55. See *Hood v. Ryobi Am. Corp.*, 181 F.3d 608, 611 (4th 1999) (explaining that information overload may render a product as defective as insufficient information); *Aetna Cas. & Sur. Co. v. Ralph Wilson Plastics Co.*, 509 N.W.2d 520, 523 (Mich. Ct. App. 1993) (recognizing that "excessive warnings on product labels may be counterproductive, causing 'sensory overload' that literally drowns crucial information in a sea of mind-numbing detail"); see also James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265 (1990); Twerski, *supra* note 49 at 514-17 (mentioning the actual cost of additional warnings and contending that a marketing plan that informs the consumer of all possible risks of a particular product is simply not feasible).

56. See, e.g., *Aetna Casualty & Sur. Co. v. Ralph Wilson Plastics Co.*, 509 N.W.2d 520, 523 (noting that Michigan courts have consistently held that "sensory overload" may occur if a manufacturer provides an encyclopedia of warnings); Twerski, *supra* note 49 at 514-17 (offering a discussion of the hazards of "crying wolf" and cautioning that excessive warnings may be counterproductive); see also Cantú, *supra* note 54, at 53-54 (noting that case law and jurisprudence recognize that information overload does not solve the adequacy of the warning dilemma).

57. See, e.g., *Feldman v. Lederle Labs.*, 592 A.2d 1176, 1200 (N.J. 1991) (noting that the FDA has acknowledged the possibility of information overload with regard to prescription medication); *Wagner v. Roche Labs.*, 671 N.E.2d 252, 258 (Ohio 1996) (explaining that the FDA requires that only information concerning known hazards should be included and warned about); *Ayers v. Johnson & Johnson Baby Prods. Co.*, 797 P.2d 527, 534 (Wash. Ct. App. 1990) (realizing that the possibility of information overload may cause consumers to pay less attention to warnings on labels); see also Mark Geistfeld, *Inadequate Product Warnings and Causation*, 30 U. MICH. J. L. REFORM 309, 322-27 (1997) (recognizing that people will stop reading warnings if the warnings disclose risks that are easily observed and recognized by the average consumer; in other words, the average consumer is concerned with material disclosures).

58. See *Anguiano v. E. I. DuPont de Nemours & Co.*, 808 F. Supp. 719, 722 (D. Ariz. 1992) (noting that strict liability may impose liability on a manufacturer for placing a product into the stream of commerce without adequate instructions); *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 553-54 (Cal. 1991) (noting that a manufacturer can be held liable for placing a product into the stream of commerce without adequate warnings); *Sharp v. Wyatt, Inc.*, 627 A.2d 1347, 1353 (Conn. App. Ct. 1993) (applying a Connecticut statute, which holds a product seller liable for selling a product without adequate warnings and instructions).

ing substances in fast food is becoming common knowledge. The very information mentioned in the introductory part of this article would indicate that the American public is becoming more informed of this fact, and as a result, fast food companies would be absolved of any duty or obligation to warn. Judicial opinions are quite clear that there is no duty to warn of an obvious or known risk.⁵⁹

With regard to our discussion, a strong argument can be made that food products known to be fattening need not carry such a warning. Perhaps the most that could or should be required is that the fast food industry follow the same course of action required of manufacturers of pre-packaged food, and list the representative ingredients in their foods along with the corresponding amount of calories per serving.⁶⁰ Making this information easily available would satisfy the reasonably prudent consumer as to the contents of the food and the corresponding fattening qualities. If fast food is not likely to be found defective from a mismanufactured or mis-marketed litigation perspective, the question remains whether it could or should be considered defective because it has been mis-designed.

C. *Mis-Designed*

Mis-designed signifies that all of the ingredients, or rather the entire image of the product, have been consciously intended by the manufacturer.⁶¹ A mis-designed product, like one which has been mis-marketed, is different from a mismanufactured product in three ways. First, the various tests for determining defectiveness of a product under a mis-designed analysis are different.⁶² Second, a mis-designed product is introduced into the stream of commerce in a condition intended by the manufacturer;⁶³ and third, a finding of de-

59. See, e.g., *Tillman v. R.J. Reynolds Tobacco Co.*, 871 So.2d 28, 32 (Ala. 2003) (stating that manufacturers will not be held liable for defective products that possess patent and obvious dangers); *Brown v. Sears, Roebuck & Co.*, 667 P.2d 750, 756 (Ariz. Ct. App. 1983) (finding that a defect was so obvious that the manufacturer had no obligation to warn).

60. Cf. 21 C.F.R. § 101.9 (j) (2004) (exempting restaurants from the requirements for disclosing the ingredients and nutritional information related to the foods they sell).

61. See 1 OWEN, *supra* notes 23, at § 7:1.

62. Various tests have been utilized when determining whether a product is defective due to mis-design. See, e.g., 63A AM. JUR. 2d §§ 938-87 (1997) (identifying various analytical methods for determining design defects including the risk/utility test, the consumer expectation test, the reasonably prudent manufacturer test, the unreasonably dangerous test, and the unreasonable risk of harm test).

63. See, e.g., *Camacho v. Honda Motor Co.*, 741 P.2d 1240, 1247 (Colo. 1987) (noting that in design-defect or failure-to-warn cases, the product has been manufactured

fectiveness will condemn the defendant's entire line of production.⁶⁴ Perhaps it is for this last reason that our judicial system struggled for so long to create an effective standard for this type of defect.⁶⁵ The standard which ultimately emerged as the prevailing test for defectively designed goods is, again, the so-called risk/benefit analysis.⁶⁶

The same formula of probability (P) of loss (L) times the gravity of injury (G) being compared to the burden (B) of reducing or eliminating that risk is used.⁶⁷ If the burden (B) of reducing or eliminating the risk is greater than the sum of the first three factors, the product is not defective. If the opposite is true, then the product is defective. The burden in this instance, however, is more complex than the burden in a mis-marketing analysis.⁶⁸ The burden in a mis-design case involves presenting feasible alternatives for the product.⁶⁹

exactly as intended); *Trull v. Volkswagen of Am., Inc.*, 761 A.2d 477, 481 (N.H. 2000) (defining a design defect as one which is manufactured in conformity with the intended design).

64. See, e.g., *Brady v. Melody Homes Mfr.*, 589 P.2d 896, 899 (Ariz. Ct. App. 1978) (stating that a design defect renders an entire product line defective); *Banks v. ICI Ams., Inc.*, 450 S.E.2d 671, 673 (Ga. 1994) (determining that when a product is defectively designed, the entire line of products is called into question); *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 185 (Mich. 1984) (concluding that the finding of liability on a defective-design theory condemns an entire line); *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 60 (N.M. 1995) (agreeing with other jurisdictions that a design defect affects the entire product line); see also Michelle Capezza, Comment, *Controlling Guns: A Call for Consistency in Judicial Review of Challenges to Gun Control Legislation*, 25 SETON HALL L. REV. 1467, 1486 n.65 (1995) (asserting that when a product is mis-designed, "every one of the products represents a potential lawsuit against the manufacturer").

65. Compare *Brady*, 589 P.2d at 900 (contemplating the nature of the test that is used for design defects and the recognition of expansive ramifications) with *Banks*, 450 S.E.2d at 673-74 (explaining the search for a design-defect test) and *Brooks*, 902 P.2d at 60 (rejecting the *Prentis* logic of holding a plaintiff to a higher threshold).

66. See, e.g., *Gen. Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1221 n.15 (Alaska 1998) (noting that most jurisdictions rely on the risk/utility test rather than the consumer expectation test in cases of design defect); *Hansen v. Baxter Healthcare Corp.*, 764 N.E.2d 35, 41-42 (Ill. 2002) (noting that a risk/benefit analysis is embedded within a design-defect analysis); *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 165 (Iowa 2002) (noting that the risk/benefit test used in design-defect cases is the same as the one employed in negligence cases).

67. See *supra* note 49-52 and accompanying text.

68. To recover for a manufacturing defect or a marketing defect, plaintiffs must only demonstrate that they were injured because of a defect in one product or that they were misinformed and not allowed to protect themselves; however, in a design-defect case, plaintiffs must also offer an alternative design. See *infra* notes 69-73 and accompanying text.

69. See, e.g., *Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1479 (10th Cir. 1993) (noting that without evidence of a feasible alternative design, the jury question of design defect is inappropriate); *Barton v. Adams Rental, Inc.*, 938 P.2d 532, 537 (Colo. 1997) (noting

The feasible alternative test requires the new design to meet five characteristics. First, the new design must be feasible within the state of present technology because we will not ask the defendant manufacturer to do that which is impossible.⁷⁰ Second, it must be as marketable as the original version introduced by the defendant, because the defendant is in the business of selling products and we do not want to impair the defendant's market share.⁷¹ Third, it cannot impair the utility of the product because we do not wish to eliminate the qualities that make the product attractive to the consuming public.⁷² Fourth, it must be cost effective because we will not require manufacturers to spend themselves into bankruptcy.⁷³ Fifth, it must be safer than the

that a feasible alternative is a factor in the risk/benefit analysis); *Wright v. Grooke Group Ltd.*, 652 N.W.2d 159, 169 (Iowa 2002) (adopting the rule that a plaintiff trying to recover under a design-defect theory must prove that an alternative design existed); *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204, 208 (N.Y. 1983) (explaining that one of the factors a jury may consider in a design-defect case is whether a safer alternative design was available). *But see Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 96-97 (Minn. 1987) (stating that a plaintiff does not always have to prove the existence of a "safer, feasible alternative design as an element of an alleged defective product design case").

70. *See, e.g., Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1105 (Ill. 1997) (noting that an alternative design must be practical); *Cavanaugh v. Skil Corp.*, 751 A.2d 518, 521 (N.J. 2000) (interpreting the state-of-the-art defense under New Jersey law as not requiring an alternative design if the alternative design is not practical); *DeWitt v. Eveready Battery Co.*, 550 S.E.2d 511, 518 (N.C. Ct. App. 2001) (interpreting North Carolina law to require a practical alternative). *But see Robinson v. G.G.C., Inc.*, 808 P.2d 522, 525 (Nev. 1991) (noting that a manufacturer may be held liable for failing to include a state-of-the-art safety device that existed at the time of manufacture).

71. For example, a few states have enacted legislation that requires an alternative design to be as marketable as the original defective product. *See, e.g., 735 ILL. COMP. STAT. ANN. 5/2-2104* (West 2003) (an alternative design must not impair "the usefulness, desirability, or marketability of the product"); *N.J. STAT. ANN. § 2A:58C-3(a)(1)* (West 2000) (providing that an alternative design must be practical and must not impair "the reasonably anticipated or intended function of the product"); *N.C. GEN. STAT. § 99B-6(a)(1)* (2003) (stating that an alternative design must be reasonable and must not impair "the usefulness, practicality, or desirability of the product").

72. *See Swix v. Daisy Mfg. Co.*, 373 F.3d 678, 682-83 (6th Cir. 2004) (quoting *Glittenberg v. Doughboy Recreational Indus.*, 491 N.W.2d 514 (Mich. Ct. App. 1993) (stating that an alternative design must maintain the product's utility); *Cota v. Harley-Davidson*, 684 P.2d 888, 890 (Ariz. Ct. App. 1984) (reviewing a witness's testimony, which states that the alternative design would have removed the product's defect without encumbering the product's utility).

73. *See, e.g., Merrill v. Navegar, Inc.*, 28 P.3d 116, 125 (Cal. 2001) (noting that the cost of an alternative design is a factor for a jury to consider when determining whether a product was defectively designed); *Banks v. ICI Ams., Inc.*, 450 S.E.2d 671, 674 (Ga. 1994) (noting that at some point the benefits of attaining a safer product are outweighed by the costs of attainment); *Uniroyal Goodrich Tire Co. v. Martinez*, 977

original product because we are seeking to reduce the risk of harm.⁷⁴ In a fast food liability case, this would result in a healthier food product.

A short discussion of the elements of the feasible alternative test will give us a better understanding of the original question presented by this article: whether the alleged fattening nature of the Big Mac should be considered defective under products liability law.

The first element, requiring an alternative design to be within the realm of our present technology, is a common-sense rule and when limited to the confines of our Big Mac discussion it is an easy one to meet.⁷⁵ While this may pose serious debate in more complex products, it is not a formidable barrier when considering food. Non-fattening ingredients in this day are not only sought but are easy to substitute.⁷⁶ The solution to a fattening hamburger patty is simple. Leaner meat, which is usually meat of a higher grade and a lower fat content, would not only be feasible within the state of our present

S.W.2d 328, 335 (Tex. 1998) (stating that the costs of an alternative design should not outweigh its usefulness).

74. See, e.g., *Moore v. ECI Mgmt.*, 542 S.E.2d 115, 119 (Ga. Ct. App. 2000) (stating that a safer alternative as a substitute is a factor in determining design-defect); *Nissan Motor Co. v. Nave*, 740 A.2d 102, 118 (Md. Ct. Spec. App. 1999) (requiring a plaintiff to prove a safer alternative design before recovering on a theory of design-defect); *Tracy v. Cottrell*, 524 S.E.2d 879, 893 (W. Va. 1999) (noting that a plaintiff must prove that an alternative design existed, was feasible, and was safer than the original product).

75. Food technology is constantly advancing, and companies frequently experiment with alternate product designs as a result. See, e.g., Daniel Kadlec, *Chain Reaction: Ruby Tuesday Serves Up Fewer Carbs, Calories and Fat—And an Annotated Menu That Lets You Keep Track*, TIME, June 7, 2004, at 99 (stating that McDonald's has cut portion sizes, Frito-Lay has reduced the amount of trans fats in its products, and other companies have been promoting products for a healthier lifestyle); Laura Shapiro, *Fake Fat: Miracle or Menace? (Olestra)*, NEWSWEEK, Jan. 8, 1996, at 60 (examining the attempts to implement olestra, a calorie-free fat substitute that can be used for frying); Jennifer Barrett, *Fast Food Need Not Be Fat Food*, NEWSWEEK, Oct. 13, 2003, at 73 (explaining the steps that some fast-food producers have taken in response to health-conscious consumers).

76. See, e.g., Michael D. Lemonick & John Skow, *Are We Ready for Fat-Free Fat*, TIME, Jan. 8, 1996, at 53 (explaining that olestra, a new food innovation, is a fat without the negative attributes of traditional fat); see also Boyle, *supra* note 16, at 138 (commenting on the role technology plays in the development of fast food and noting that "companies like Procter & Gamble, Tropicana, and others quietly employ [a technology company] to take their foods, remove bad stuff like sugar or fat, and then rebuild them so that our mouths will never know the difference").

technology, but it would also be easy to acquire and probably healthier in the long run.⁷⁷

Meeting the elements of marketability and utility are also easy objectives. McDonald's and other fast food purveyors undertake a tremendous amount of market research before introducing a product into the stream of commerce.⁷⁸ Public opinion,⁷⁹ taste tests,⁸⁰ and a wide variety of market research techniques often play a very large and important part in the design of items offered on fast food menus. There is little question that fattening foods are often tastier than leaner foods.⁸¹ Much has been written on this particular phenomenon, especially in the area of so-called comfort food,⁸² but a solution is not impossible.⁸³ Manufacturers have the ability to produce alternatives that are capable of meeting the taste preferences of the consuming public while also being less fattening; with modern technology,

77. See, e.g., Joanne Silberner, *Back to the Meat Counter: Fat Dodgers Can Rejoice in the Industry's New Lower-Fat Entrees*, U.S. NEWS & WORLD REP., May 4, 1992 at 80 (noting that food manufacturers who produce ready-to-eat entrees are creating meals using much leaner beef).

78. See, e.g., Jack Hayes, *Nutrition Latest Theme in Disney World Dining*, NATION'S RESTAURANT NEWS, July 8, 1991, at 1 (contrasting Disney's low-fat menu change with McDonald's million-dollar advertising blitz upon introducing the McLean Burger).

79. See, e.g., David Stires, *Fallen Arches*, FORTUNE, Apr. 29, 2002, at 75 (explaining that McDonald's finished last in a public opinion poll taken in recent years); *Fat Nation Fights Back—Sort Of*, U.S. NEWS & WORLD REPORT, July 1, 2002, at 4 (predicting that once class-action lawsuits against fast-food giants are initiated, public opinion will begin to shift against the fast-food industry, and class-action lawsuits against such fast-food giants will be more successful).

80. See, e.g., Hayes, *supra* note 78 (noting that Disney unveiled its low-fat burger after four months of "rigorous taste tests").

81. See Lemonick, *supra* note 1, at 67 (explaining that cattle farmers "are raising vast herds of cattle whose meat is laden with the fat that makes it taste so good"); Boyle, *supra* note 16, at 136-37 (explaining the failure of recent healthy alternatives to traditional fast food and quoting Janice Meyer, a former analyst, who indicates that most fast food health alternates failed because the companies were "chasing the nutritional content and not the taste bud"). But see Marjory Roberts, *Health Food?*, U.S. NEWS & WORLD REP., May 20, 1991, at 73 (noting that in a taste test, college students found a lower fat version of certain fast foods to be just as palatable as their grease-laden predecessors).

82. See Rebecca Oliva, *Changing Patterns: Hotel Restaurants Open the Door to New Dining Styles in Their Markets*, HOTELS, May 2004, at 92 (noting that American cheeseburgers, apple pie, meat loaf, and fried chicken are classic American comfort foods).

83. See Julie Rawe, *Snacks Go Low Carb: Atkins Dieters Are Springing for New Junk-Food Substitutes That—Surprise—Don't Taste Half Bad*, TIME, Aug. 18, 2003, at 47 (noting that manufacturers have improved the taste of sugar-free candies over the years); Alex Taylor III, *Why Du Pont Is Trading Oil for Corn*, FORTUNE, Apr. 26, 1999, at 158 (explaining that a new variety of corn used as chicken feed has improved the flavor of chicken).

manufacturers can easily add spices or other taste-enhancing elements.⁸⁴ As a result the marketability, as well as the third element of utility, of a less fattening food product would not impair the product or in some instances may even improve its desirability.

Cost is also an important element.⁸⁵ Our economy is a capitalistic one, and we will not force manufacturers into bankruptcy by making them meet the requirements of a feasible alternative;⁸⁶ however, manufacturers use commercial discounts,⁸⁷ foreign imports,⁸⁸ outsourcing,⁸⁹ and other techniques to reduce the cost of manufacturing every

84. See, e.g., *Native Mushroom Extract Developed*, 12 FOOD INGREDIENT NEWS, Jan. 1, 2004, available at 2004 WLNR 6573257 (explaining that "mushroom extract is completely water-soluble and fat-free and has no enzyme activity, which gives it good shelf life. The extract can be used in liquid or powdered forms to improve the taste of foods with sensitive fat content (butter fats or creams)."; *Exotic Flavor from Cactus/Ginseng Combo*, 11 FOOD INGREDIENT NEWS, July 1, 2003, available at 2003 WLNR 6486692 (noting that the combination of cactus and ginseng improves flavor and nutritional value); *Fats/Replacements: Low Fat Additives Drive Market*, 7 FOOD INGREDIENT NEWS, Sept. 1, 1999, available at 1999 WLNR 3726044 (mentioning a company that makes carrageenan and microcrystalline cellulose, which "enhance texture and taste in low-fat foods").

85. See, e.g., *supra* note 73 and accompanying text; *Hannah v. Gregg, Bland, & Berry, Inc.*, 840 So. 2d 839, 858-60 (Ala. 2002) (including cost in the court's alternate design analysis). *But see* *Smith v. Louisville Ladder Co.*, 237 F.3d 515, 532 (5th Cir. 2001) (explaining that because of information limitations, "a plaintiff is not required to establish with particularity the costs and benefits associated with adoption of the suggested alternative design").

86. See *supra* note 73 and accompanying text.

87. Compare Patricia Sellers, *The Dumbest Marketing Ploy*, FORTUNE, Oct. 5, 1992, at 88-89 (explaining that sellers who give mass wholesale discounts may lose large amounts of money in the long run) with Michael Barbero, *Retail Falls Short of Projections, High End Retailers Post Holiday Gains*, WASH. POST, Jan. 7, 2005, at E1 (discussing retailers' reliance on discounts to boost sales during the December holidays).

88. See Margot Roosevelt, *Made in the U.S.A.: Where Does That Hamburger Come From? Those Strawberries? America's Ranchers and Farmers Think You Have a Right to Know*, TIME, Aug. 9, 2004, at A4 (noting the predominance of imported foods in America, while explaining that American farmers and ranchers often suffer from foreign imports of beef and produce); Lou Dobbs, *Coming Up Empty*, U. S. NEWS & WORLD REP., Jan. 26, 2004, at 46 (stating that "our market is flooded with cheap foreign imports while consumers who want to buy American-made products often can't even find them"); Daren Fonda, *Steeling Jobs: America's Ailing Mills Want Another Bailout—With the Cost Falling on Companies That Use Steel*, TIME, Feb. 25, 2002, at B6 (explaining the effect of foreign imported steel on U.S. steel mills).

89. See Lou Dobbs, *The Myth of 'Insourcing'*, U.S. NEWS & WORLD REP., May 3, 2004, at 56 (explaining that future outsourcing of jobs could lead to the loss of fourteen million American jobs); Justin Fox, *Where Your Job Is Going: A Visit to Bangalore, India, a City Where Tech Is Hot, the Drinks Are Cold, Work Is Plentiful, and the Salaries Are a Lot Lower Than Yours*, FORTUNE, Nov. 24, 2003, at 84 (highlighting the business aspects of outsourcing jobs to low wage earning countries).

day. This should not be a formidable obstacle, especially when we consider that most additional business costs are passed on to the consuming public.⁹⁰

The fifth and last element to consider is safety, and in all probability, this is the most important element. After all, by requiring that a feasible alternative to an existing product be established in order to prove defectiveness, our main objective is to guarantee that additional injuries will not be inflicted.⁹¹ Unfortunately, this is where potential plaintiffs usually encounter their most difficult hurdles. Simply stated, how can we consider a food product defective when it advertises that billions⁹² of that food product have been sold to consumers? And how can we find such a food product “unreasonably dangerous” as the Restatement requires?⁹³ It is true that a leaner version of the Big Mac will be healthier, technologically feasible, cost efficient, and just as marketable and useful as the current version; but will it be safer? An affirmative response would imply that the present version is dangerous. This is not true.

Perhaps a comparison to cigarettes should be made at this point. There is no question that excessive smoking over an extended period of time can be harmful.⁹⁴ It has been proven that such practice often leads to lung cancer, emphysema, heart problems, high blood pressure, and other illnesses.⁹⁵ The negative consequences of smoking to-

90. See, e.g., S. REP. NO. 104-69, at 6 (1985) (stating that “[c]onsumers must ultimately bear through higher prices the excessive costs of our product liability system”); Anna Bernasek, *Will This Recovery Run Out Of Gas?*, FORTUNE, May 31, 2004, at 38 (noting that airlines are able to pass increased fuel prices on to consumers); Jill Jordan Sieder, *To Catch a Thief, Try This: Peddling High-Tech Solutions to Shoplifting*, U.S. NEWS & WORLD REP., Sept. 23, 1996, at 71 (noting that retailers pass on the cost of shoplifting to consumers).

91. See *supra* note 74 and accompanying text.

92. See, e.g., Amy Garber, *McD Beefs Up Plan to Focus on Core Brand, Eyes Sale of Nonburger Chains: Takes 4th-Q Charge of at Least \$300M as Company Sets Up Revamp*, NATION'S RESTAURANT NEWS, Jan. 5, 2004, at 4 (stating that McDonald's is eager to maintain its recent high-flying U.S. sales momentum by focusing its efforts on Big Mac advertising).

93. RESTATEMENT (SECOND) OF TORTS § 402(A) (1965).

94. See, e.g., Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41,314 (Aug. 11, 1995) (to be codified at 21 C.F.R. pt. 801, 803, 804, 897) (listing the negative health effects of smoking). The more cigarettes one smokes and the longer one smokes, the greater the risks of health problems. *Id.*

95. See, e.g., Regulations Restricting the Sale and Distribution of Cigarettes, 60 Fed. Reg. 41,314 (listing the negative health consequences of smoking, including cancer of the mouth, larynx, and esophagus, pancreatic cancer, kidney cancer, cancer of the cervix, stomach cancer, strokes, peptic ulcer disease, infertility, etc.).

bacco are widely reported.⁹⁶ Nonetheless, notwithstanding its addictive nature, some studies have shown that smoking an occasional cigarette is not considered deadly,⁹⁷ and tobacco is not widely considered a defective product. Just as excessive consumption of alcohol may lead to alcoholism⁹⁸ or injury to the liver,⁹⁹ the excessive ingestion of sugar by a diabetic may prove harmful,¹⁰⁰ or the excessive consumption of laxatives may cause injury,¹⁰¹ excessive consumption of Big Macs may also produce undesirable effects.¹⁰² So the primary question remains: is the Big Mac defective and unreasonably dangerous? The answer must be an emphatic no! In fact, these issues were specifically addressed when section 402A of the Restatement (Second)

96. See, e.g., Matthew Baldini, *The Cigarette Battle: Anti-Smoking Proponents Go for the Knockout*, 26 SETON HALL L. REV. 348, 370 (1995) (stating that lung cancer was the most prevalent cancer linked to smoking, and noting other smoking related diseases such as chronic bronchitis, emphysema, and coronary artery disease); J. Michael McGinnis & William H. Foege, *Actual Causes of Death in the United States*, 270 JAMA 2207, 2208-10 (1993) (finding that tobacco use ranks as one of the leading causes of death among Americans); Sarah Payne, *Smoke Like a Man, Die Like a Man?: A Review of the Relationship Between Gender, Sex and Lung Cancer*, Social Sci. & Med., Oct. 15, 2001, at 1067 (noting that lung cancer from smoking is one of the greatest preventable causes of death). Because of the dangers of smoking, a warning label is required on cigarette packages. 15 U.S.C. § 1333 (1982). Also, advertising of tobacco products via electronic media has been banned. 15 U.S.C. § 1335 (1982).

97. Despite all of the evidence to the contrary, studies have occasionally indicated that there may be some health benefits reaped from smoking. See Peter Brimelow, *Thank You for Smoking . . .?*, FORBES, July 4, 1994, at 80 (explaining a theory that smoking an occasional cigarette reduces the possibility of Parkinson's Disease, Alzheimer's Disease, endometrial cancer, prostate cancer, osteoarthritis, and colon cancer).

98. See MayoClinic.com, *Alcoholism*, at <http://www.mayoclinic.com/invoke.cfm?id=DS00340> (last visited Feb. 21, 2005) (explaining that alcoholism, which is usually associated with physical dependence on alcohol but may also be the result of genetic, psychological and social factors, is often a progressive disease which involves preoccupation with alcohol and impaired control over the consumption of alcohol).

99. See *id.* (stating that years of drinking heavily may lead to cirrhosis).

100. See Robert S. Dinsmoor, *Diabetes: Lifting the Sugar Embargo*, HARV. HEALTH LETTER, Oct. 1994, at 7 (explaining that high consumption of sugar by diabetics can lead to an increase in glucose levels, which can be debilitating and even fatal).

101. See Ara DerMarderosian & Sharon M. Brudnicki, *The Misuse and Abuse of OTC Laxatives*, AM. DRUGGIST, Jan. 1996, at 49 (noting that laxatives are commonly used to treat constipation, yet laxative use can lead to disorders); Paula Kurtzweil, *Dieter's Brews Make Tea Time a Dangerous Affair: Slim Chance of Weight Loss with These Herbal Drinks*, FDA CONSUMER, July 17, 1997, at 9 (noting that the abuse of laxatives can cause diarrhea, vomiting, nausea, stomach cramps, chronic constipation, fainting, and even death).

102. See, e.g., SCHLOSSER, *supra* note 14, at 239-43 (connecting the regular consumption of fast food products with a wide variety of health problems).

of Torts was adopted.¹⁰³ The Comments were good law then and remain good law today.¹⁰⁴

The most that can be said is that there may be a duty of disclosure. As mentioned above, other products have followed this path. A fair, honest, and conspicuous statement with regard to the contents of the Big Mac, including calorie content, would certainly place the consumer on notice. After that, as with many other products for use or consumption, the choice would belong to the individual.

No product is technologically perfect, and any product can cause injury. Overeating, as with excessive smoking or drinking, produces negative results. This logic is certainly applicable to the Big Mac, but it could never be maintained that the Big Mac is defective.

III. CONCLUSION

There is no question that Americans are growing more concerned about their weight. While there was no intention to single out the Big Mac as the ultimate culprit, there is little question that it is the definitive icon of fast food consumption. Using it as such, an attempt has been made to determine whether fast food is or should be considered defective under products liability law. This discussion of the various elements has suggested that fast food, however fattening, cannot be considered defective under products liability law.

103. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965) (stating that “a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized” and “the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart”).

104. See *id.*; *Strong v. E. I. Du Pont de Nemours Co.*, 667 F.2d 682, 687 (8th Cir. 1981) (noting that comment j does not impose upon manufacturers a duty to warn consumers of a product’s potential dangers when the consumers know or should know of the potential dangers); *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 269-70 (D. R.I. 2000) (noting that comment j shields sellers from liability for failing to warn consumers of potential dangers); see also *Schmidt v. Centex Beverage, Inc.*, 825 S.W.2d 791, 794 (Tex. App. 1992) (applying comment j and finding that manufacturers do not have a duty to warn consumers of the dangers of driving while intoxicated).